Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

DENISE GRAFF,

Petitioner,

vs.

V&M ERECTORS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED FOR REVIEW

In a hostile-environment employment discrimination case, to whom must a plaintiff complain in order to impose respondeat superior liability on the employer?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here include those who appear in the caption of the case. There is no parent or subsidiary of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Denise Graff, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, other than in table form at 132 F.3d 1461 (11th Cir. 1997) and 136 F.3d 1333 (11th Cir. 1998) (*en banc*). The opinion is reproduced in the Appendix ("App.") at 3a and 1a (*en banc*). The opinion of the district court is unreported, but is reproduced at 5a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on December 15, 1997. Rehearing and rehearing *en banc* were denied February 10, 1998. This Court, through Justice Kennedy, on May 8, 1998, enlarged until June 17, 1998 the time within which for Graff to file her petition for certiorari.

STATUTE INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (Title VII), is set forth below:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer —
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

> individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

I. Facts

Almost immediately after Denise Graff began working with V & M Erectors as an apprentice iron worker, David Sargent, her foreman, evidenced an "anti-female" attitude, refusing to train her and telling crew members that he did not want her on "his crew." To force her to quit, Sargent intentionally endangered Graff, requiring her to lift enormous amounts of weight and to tie an iron column during a thunder storm. Her option was to "go home." After Graff complained to Jimmy Sutton, the superintendent, about Sargent's behavior, the situation worsened. Ray Sargent, David's brother, added to the harassment graphic sexual comments and groping of Graff's breasts and buttocks. Graff went to V & M's office and complained to the owner's daughter. Nothing was done. Following a second complaint to Sutton, Sutton ineffectually told the Sargents to stop.

Graff demanded, after Ray Sargent threatened to rape her, to speak to Vern Nix, president of the 60-employee company. Sutton told Graff that she could not

speak to Nix until sometime the following week. Graff tried to telephone Nix, but not could reach him. Although Nix, when he learned from Sutton what was happening, ordered Graff and the Sargents separated, the Sargents followed Graff to her new job site and continued the harassment. During a five-minute meeting the next week, Nix cut Graff off and told her to stop crying. She then began a vacation from which she never returned.

II. Procedural background

Graff sued, alleging violation of Title VII of the Civil Rights Act of 1964, as amended, (Count I) as well as of the parallel Florida Civil Rights Act of 1992 (Count II). She also asserted common law claims for negligent training, supervision and retention (Count III), intentional infliction of emotional distress (Count IV), and battery (Count V). V & M moved for summary judgment, which Graff opposed.

The district court on March 19, 1997, granted the motion for summary judgment as to Counts I and II, dismissing each with prejudice, and dismissed the other supplemental state-law claims without prejudice. The district court found "little help" from circuit precedent that required reporting of hostile-environment employment discrimination to "higher management," Appendix at 13a, because "[t]he closeness and informal operation of V & M distinguishes it from any of the Eleventh Circuit cases cited above." *Id.* The district court then set out essentially to craft a small-business standard for notice to employers of hostile-environment employment discrimination. The district court held that, in a situation such as the one at bar, the only notice to the corporate employer that imposes any duty on the corporation to act would be notice to someone with the

power to fire the offending actor: "Stern reprimands are no substitutes for pink slips." Appendix at 14(a).

Petitioner filed a notice of appeal April 1, 1997. The Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's final decision.

The Court of Appeals for the Eleventh Circuit affirmed the district court per curiam December 15, 1997, "based on the district court's well-reasoned order," following which petitioner moved for rehearing January 2, 1998 and suggested rehearing en banc. The Court of Appeals denied rehearing and rehearing en banc by order dated February 11, 1998.

This Court, through Justice Kennedy, on May 8, 1998, enlarged until June 17 the time within which for Graff to file her petition for certiorari.

REASON FOR GRANTING THE WRIT.

The decision below conflicts with the decision of at least one other United States court of appeals on the issue of how the negligence principles should be applied in hostile environment sexual harassment cases.

The Court should grant the petition for a writ of certiorari to establish uniformity among the circuits in the application of the doctrine of *respondeat superior* in the area of sexual harassment cases.

The circuits are in conflict. Division exists between the Eleventh Circuit, which insists that notice be made to

"higher management,"[1] and the Seventh Circuit, which has held that it is sufficient for a sexual harassment victim to give notice "to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it."[2] Although the Eleventh Circuit-Seventh Circuit dichotomy is the most crystalized, two other circuits have positioned themselves similarly to the Court of Appeals for the Seventh Circuit.[3]

By affirming the district court's grant of summary judgment based on the district court's discussion, the Court of Appeals for the Eleventh Circuit has endorsed, for small businesses, such as respondent, what essentially is a "highest management" standard. After rejecting the court of appeals analysis in several cases involving larger

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[1] The district court, for example, relied upon *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) (Pizza Hut manager not "higher management" for purpose of notice of sexual harassment of kitchen workers by delivery driver and *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988) ("employee can show that employer had knowledge of the harassment by proving that she complained to higher management of the problem...") (complaint to general manager of car dealership sufficient).

[2] *Young v. Bayer Corp.*, 123 F. 3d 672, 675 (7th Cir. 1997)(reversing summary judgment on grounds that plant worker's notice to department head was sufficient notice to the company).

[3] *See Bonenberger v. Plymouth Township*, 132 F.3d 20, 27 & n. 7 (3rd Cir. 1997)("[s]ince, under the police department's own policy, Sergeants Galetti and Carbo were responsible for investigating complaints of sexual harassment...their failure to take prompt and appropriate remedial action, if proven at trial, gives rise to departmental liability")(citing to *Young*); *Torres v. Pisano*, 116 F.3d 625, 637 (2nd Cir. 1997)(supervisor's "knowledge could potentially have been imputed to NYU on the ground that Pisano had a duty to inform the company of the harassment").

operations as "provid[ing] little help" because of "the closeness and the informal operation of V&M," App. at 15a, the district court went on to analyze a workplace that had an average of 60 employees and one hiring-and-firing boss, i.e., Mr. Nix. The district court stated that "[a]lthough Mr. Sutton would handle initial complaints regarding sexual harassment, Ms. Graff does not dispute that Mr. Nix instructed his female employees to report incidents of sexual harassment to him personally if reports to Mr. Sutton failed to ameliorate the conditions." App. at 15a.

The district court then held:

> The determination of who counts as higher management must turn not only on the size of the corporation, but on the degree to which the highest manager in the corporation delegates the role of ombudsman to subordinates. The "higher manager" inquiry evidently is calculated to place liability on the corporation when a person in the corporation who could have terminated the inappropriate behavior learned of the behavior but failed to bring it to an end. In this case, two factors compel the conclusion that Mr. Hutton was not "higher management." First, because he lacked the authority to fire the Sargent brothers, he had limited power to bring an end to their alleged misbehavior. Stern reprimands are poor substitutes for pink slips. Second, Ms. Graff herself seemed to recognize that her complain ultimately should be lodged with Mr. Nix himself. After complaining three times to Mr. Sutton, she went to Mr. Nix and complained of her mistreatment as Mr. Nix had instructed her to do. Under the circumstances, the Court holds that, as

a matter of law, Mr. Sutton was not higher management for purposes of imputing notice to V&M.[9]

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9. If Mr. Sutton was not higher management, Dave Sargent, a foreman, certainly was not higher management. Also, at oral argument counsel for the plaintiff suggested that Ms. Graff had addressed her complaint to Mr. Nix's daughter during a telephone conversation, and that this should count as notice of the corporation. The record, however, does not indicate that Mr. Nix's daughter was employed by V&M in any capacity that would make her "higher management" of the corporation, and the mere fact that she was related to Mr. Nix cannot make up for this deficiency.

App. at 15a-16a & n. 9.

By affirming the district court, the court of appeals uses the "higher management" theory to cloak a small-to-medium-sized company[4] with a "Mom-and-Pop store" exemption to traditional notions of negligence, i.e., excusing it from a finding of notice when the company either knew or should have known of a discriminatory environment. At the same time, it imposes on small-business employees the formality of identifying and communicating to a corporate-level official.

The decision below extends the Eleventh Circuit's

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4 Some 15.7 million of the nation's 86.9 million employees, 18 per cent of all those persons employed, work for 403,000 companies employing between 20 and 99 persons. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMM., 1992 ENTERPRISE STATISTICS, COMPANY SUMMARY 9 (1997).

"higher management" doctrine to its logical end. This go-to-the-top requirement thwarts the remedial purpose of Title VII, i.e., "'"to strike at the entire spectrum of disparate treatment of men and women" in employment,' which includes requiring people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). It places upon the victim of discrimination and/or harassment the onus of finding the top person in the company and complaining only to that person, as opposed to placing the burden on the employer to enforce, from the top down, a zero-tolerance approach to employment discrimination in the form of sexual harassment.[5]

The rule clearly articulated in *Young*, and suggested by the *Bonenberger* and *Pisano* courts, on the other hand, is consistent with both congressional policy and the policy guidance issued by the Equal Employment Opportunity Commission calling for an "effective preventative program" and prompt, thorough investigation. EEOC Policy Guidance on Sexual Harassment, 8 Fair Employment Practices Manual (BNA), at 405:6699-6700. By recognizing that notice to the employer occurs as soon as discriminatory behavior is communicated "to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it," *Young*, 123 F. 3d at 675, the Court would restore to Title VII cases involving discrimination by co-workers the same kind of knew-or-should-have-known test that governs every other kind of

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[5] *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683 (Spring 1998)(arguing for a broader, more discrimination-oriented understanding of sexual harassment than the "sexual desire-dominance paradigm" that has characterized such cases in the past).

negligence. The Court thus would eliminate the artificial barriers to relief that are erected by the highest-management standard adopted by the district court and approved by the Court of Appeals for the Eleventh Circuit.

CONCLUSION

Based on the authorities cited and the argument presented, the Court should grant the petition for a writ of certiorari.[6]

Respectfully submitted,

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[6] At the time this petition is being filed, the Court is considering *Faragher v. City of Boca Raton*, Case No. 97-282, in which the Questions Presented include the following: "May a fact-finder infer notice to an employer of hostile-environment sexual harassment... through actual notice to an intermediate supervisor, who reports it no further?" Should the Court answer that question affirmatively, then the Court could vacate the opinion of the Court of Appeals below and remand this matter for further consideration in light of its holding in *Faragher*.

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DENYING PETITION FOR REHEARING AND REHEARING EN BANC, DATED FEBRUARY 11, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 97-4541

DENISE GRAFF,

Plaintiff/Appellant,

vs.

V & M ERECTORS,

Defendant/Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____ F.2d _____).

Before DUBINA, Circuit Judge, FAY and KEITH*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no

member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

*Honorable Damon J. Keith, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED DECEMBER 15, 1997

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 97-4541

D. C. Docket No. 96-8002-CIV-KLR

DENISE GRAFF,

Plaintiff/Appellant,

vs.

V & M ERECTORS,

Defendant/Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(December 15, 1997)

Before DUBINA, Circuit Judge, FAY and KEITH*, Senior Circuit Judges.

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*Honorable Damon J. Keith, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

We affirm the district court's grant of summary judgment in favor of the defendant and against the plaintiff based on the district court's well-reasoned order filed on March 19, 1997.

Affirmed.

APPENDIX C — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MARCH 19, 1997

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 96-8002-Civ-Ryskamp

DENISE GRAFF,

Plaintiff,

vs.

V & M ERECTORS,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This Cause came before the Court upon defendant's Motion for Summary Judgment [DE 24], filed January 15, 1997, and plaintiff's Motion to Strike [DE 45], filed February 18, 1997. The motions have been fully briefed.

I. BACKGROUND

In April of 1994, Vern Nix, the sole owner of defendant V & M Erectors ("V&M"), hired plaintiff Denise Graff as an apprentice iron worker. Graff Depo, at 31, 37; Nix. Depo. at 4. During her first five weeks on the job, she worked under the supervision of Larry Clements. Graff

Depo. at 57. Plaintiff experienced no sexual harassment during that time period. *Id.* At the end of the five weeks, plaintiff moved to a different job site located in Broward County. *Id.* at 58. Now she worked under the supervision of a new foreman, Dave Sargent,[1] and, according to plaintiff, her troubles began. *Id.*

Ms. Graff alleges that from the first day on her new assignment Dave Sargent created "a very cold environment, very uncomfortable." *Id.* at 72. The first day nobody would talk to her, and, as of the second day, Mr. Sargent would leave plaintiff standing around, "and give [Ms. Graff] dirty looks, tell the guys that he wanted [Ms. Graff] off his crew, didn't want no women working on his crew." *Id.* at 73.[2] As time passed, Dave Sargent further harassed Ms. Graff by placing her into an "unsafe environment." *Id.* at 87. This unsafe environment involved Mr. Sargent's demands that Ms. Graff lift the weight that he was lifting, which was more than she could lift. *Id.* It also involved his demand that she work in dangerous storm conditions. *Id.* at 88. According to Ms. Graff, she alone was required to perform dangerous jobs. *Id.*

Ms. Graff first complained about her treatment to V & M superintendent Jimmy Sutton.[3] *Id.* at 90.

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[1] As foreman, Mr. Sargent did the same sort of work as Ms. Graff. Sargent Depo. at 45.

[2] Ms. Graff never actually heard Dave Sargent say that he did not want women on his crew, but learned of his attitude toward women from other employees. Graff Depo. at 82.

[3] Ms. Graff must have made her first complaint sometime in the middle of June, because she testified in her (continued...)

According to Mr. Sutton, he bore the responsibility of making sure that jobs ran acceptably and of tracking, materials. Sutton Depo. at 5. Although Mr. Sutton was "second in command" at V & M, he had no authority to assign employees to particular jobs, or to hire or fire. *Id.* at 5, 8. Mr. Sutton acknowledged that employees with complaints could voice their concerns to Mr. Sutton. Sutton Depo. at 9. According to Mr. Nix, when he spoke with Ms. Graff at the time of her hiring, he informed her that if she experienced any harassment or discrimination, she should report it either to the foreman or to Mr. Sutton, and failing satisfaction there, to himself. Nix. Aff. ¶ 2.

In response to Ms. Graff's complaints, Mr. Sutton informed her that she need not lift overly heavy weights. He declined, however, to transfer her back to Mr. Clements's crew because that crew did not need more workers. Graff Depo. at 91-93. Mr. Sutton apparently spoke to Dave Sargent about Ms. Graff's treatment, but her working conditions did not improve. *Id.* at 91. Indeed, according to plaintiff, they grew much worse.

Up until the complaint to Mr. Sutton, the alleged abuse had been verbal only. Beginning the following day, it became physical as well. According to plaintiff, the new offender was not her foreman, Dave Sargent, but his brother, Ray. Apparently prompted by plaintiff's complaint to Mr. Sutton, Ray began to engage in verbal abuse, such as commenting on the color of Ms. Graff's bra, and physical abuse, such as grabbing her shoulder

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[3](...continued)
deposition that she made her second complaint, which was not even a month after the First one, in the middle of July. Graff Depo. at 120.

and buttocks. *Id.* at 95. Ms. Graff responded by uttering, profanities at Ray, and complaining to Dave. *Id.* at 98. Dave said that he would reprimand Ray, but plaintiff believes that he never did, because Ray's conduct only grew worse. *Id.* Ray began recounting his sexual life to plaintiff, and making inappropriate comments about Ms. Graff menstrual cycle. *Id.* at 99. On one occasion, Ms. Graff offered her sympathy over a miscarriage suffered by Ray's girlfriend, and he responded by saying that he was happy that the baby had died. *Id.* at 101. Throughout her verbal and physical abuse, Ms. Graff indicated strongly to Ray that this conduct was unwelcome. *Id.* at 105.

In the middle of July, 1994, Ray allegedly grabbed Ms. Graff's breast. *Id.* at 121. At first she complained to Dave, who responded by saying "that's just my brother... Just the way he is." *Id.* at 122. Plaintiff then complained a second time to Mr. Sutton. *Id.* at 120. At this time Mr. Nix was out of town on vacation, and Mr. Sutton said that he would take care of the situation. *Id.* at 122. Mr. Sutton called Ms. Graff later that same evening and told her that he had gone over to the Sargents' house and told them to keep their hands off her. *Id.* at 123. Ms. Graff believes that Mr. Sutton did in fact go to the Sargent's house and warn them against harassing her, but that they did not obey his instructions. *Id.* Shortly thereafter, in the first part of August, Ms. Graff was working alone on a bridge with Ray, when he threatened to rape her if she didn't "straighten up and quit having an attitude." *Id.* at 125.

After the alleged rape threat, Ms. Graff complained to Mr. Sutton a third time. This time he contacted Mr. Nix, who was still out of town. *Id.* at 123. In response to the allegations, Mr. Nix directed that Ms. Graff be moved to a new work site in Golden Glades, pending his return.

Id. at 124. Even here the alleged harassment did not end. According to plaintiff, Ray and Dave appeared inexplicably at the Golden Glades site. *Id.* Ray then drew a picture of male and female genitals on a plank, captioned them with his and Ms. Graff's names, and displayed his creation to others working in the area. *Id.* at 126-27, Graff. Depo. II at 54.

Ms. Graff finally got the chance to air her grievance in a face-to-face conversation with Mr. Nix on August 15, 1994. Plaintiff left the meeting with the impression that Mr. Nix did not care about her complaint. *Id.* at 40. He allegedly told her "to quit crying [and] that he'd take care of it." Graff Depo. at 65-66. Ms. Graff stated that she was going to leave work until August 23, and that she wanted the situation resolved before her return. *Id.* at 70. She left, but never returned.[4]

II. LEGAL STANDARD ON A MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) sets forth the standard governing summary judgment. In its most basic form, summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S, 242, 247-48 (1986) ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material*

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[4] Subsequent to Ms. Graff's departure from the job, Mr. Nix launched an investigation of her complaints. Although the parties dispute the sufficiency of these investigations, the Court finds this to be an irrelevant issue, for reasons explained below.

fact.") (emphasis in original).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met its burden, the party opposing summary judgment may not simply rely on the pleadings or mere denials of the allegations. Rather, the opposing party must adduce some evidence showing that material facts are in issue. *Anderson*, 477 U.S. at 256. "Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *See also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Eleventh Circuit has restated the method for allocating burdens in a summary judgment motion. Specifically, in accordance with U.S. Supreme Court precedent,

> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

III. DISCUSSION

Ms. Graff's complaint contains two statutory counts, one arising under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, *et seq.*, and one under the Florida Civil Rights Act of 1992, Fla. Stat. § 760. The Court will treat these two counts together.[5] *See Blount v. Sterling Healthcare Group,* 934 F. Supp. 1365, 1370 (S.D. Fla. 1996) (following Title VII jurisprudence in evaluating FCRA claims). Plaintiff has also alleged various common law theories arising under Florida law, such as negligent retention and training, intentional infliction of emotional distress, and battery. The Court will begin with a discussion of the statutory claims.

A. The Statutory Claims

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). A Title VII plaintiff may recover against her employer by demonstrating that she was required "to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *see also Henson v. City of Dundee,* 682 F.2d 897, 902 (11th Cir. 1982) ("A pattern of sexual harassment inflicted upon an employee because of her sex

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[5] The joint disposition of Counts I and II obviates any need to discuss defendant's argument that Ms. Graff failed to exhaust her administrative remedies for purposes of bringing a FCRA claim.

is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment."). On this motion for summary judgment, defendants do not claim that plaintiff has failed to establish a genuine issue of material fact as to whether or not she was subjected to a hostile work environment.

Rather, defendants claim that plaintiff has failed to meet the fifth prong of the *Henson* test — respondeat superior. "Where . . . the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiffs supervisor or co-worker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Henson,* 682 F.2d at 905; *see also Huddleston v. Roger Dean Chevrolet,* 845 F.2d 900 at 904 (11th Cir. 1988). The standard for corporate liability in hostile environment cases should not be confused with the standard for corporate liability in *quid pro quo* cases, where the employer is strictly liable for the acts of its agents. *See Sparks v. Pilot Freight Carriers, Inc.,* 830 F.2d 1554, 1558-60 (11th Cir. 1987).

> Strict liability is illogical in a pure hostile environment setting. In a hostile environment case, no *quid pro quo* exists. The supervisor does not act as the company; the supervisor acts outside "the scope of actual or apparent authority to hire, fire, discipline, or promote." Corporate liability, therefore, exists only through *respondeat superior*; liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor.

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989), *citing Henson*, 682 F.2d at 905 (further citations omitted).[6]

Plaintiff does not claim that V & M should be directly or strictly liable for the actions of the Sargent brothers. Instead, she appears to argue that the notice to Mr. Sutton constitutes notice to V & M (thus fulfilling the "knew or should have known" requirement), and that the investigation undertaken by Mr. Nix was deficient. In order to support plaintiff's claim that V & M received notice of her complaints through her discussions with Mr. Sutton, plaintiff must prove that "she complained to higher management of the problem or [must demonstrate] that the harassment was so pervasive that an inference of constructive knowledge arises." *Huddleston*, 845 F.2d at 904; *see also Kilgore* v. *Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) (no notice to corporation where plaintiff did not complain to higher management). Plaintiff apparently chooses the actual notice route, because she focuses on Mr. Sutton's job responsibilities in an attempt to establish that he served as "higher management" of V & M. This requires the Court to consider the question of who counts as "higher management" in a closely held corporation such as V & M.

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[6] The Court notes that a panel of the Eleventh Circuit recently dealt with many of *the respondeat superior* issues presented in this case in *Faragher v. Cit of Boca Raton*, 76 F.3d *1155* (11th Cir. 1996). The full court subsequently vacated the panel's decision, and ordered rehearing en banc. 83 F.3d 1346 (11th Cir. 1996). Despite the temptation to divine clues from the full court's action, this Court must disregard the *Faragher* opinion altogether. *See* 11th Cir. R. 35-1 1 ("Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and stay the mandate.").

Because the Eleventh Circuit has never announced a definition of what constitutes "higher management," the Court must attempt to extrapolate some guidance from the holdings of various of various cases in which the Eleventh Circuit has alluded to the "higher management" standard. In *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir. 1996), the most recent decision on point, the court held that an area supervisor with responsibility for multiple restaurants, a store manager, an assistant store manager, and a dining room supervisor did not constitute "higher management."[7] In *Kilgore*, the court held, without explanation, that a Pizza Hut manager was not "higher management" of the defendant corporation, which managed the restaurant where plaintiff was employed. 93 F.3d at 754. Finally, in *Cross v. State of Alabama*, 49 F.3d 1490, 1507 (11th Cir. 1995), the court held that plaintiffs, employees of a facility run by the Alabama State Department of Mental Health and Mental Retardation would have had to report to the Department's Commissioner or Associate Commissioner in order to put "higher management" on notice of the discriminatory conditions.[8]

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[7] The Court nonetheless found constructive notice to the corporation under the "pervasiveness" doctrine. 97 F.3d at 490.

[8] *In Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503, 1512 (11th Cir. 1998), a race discrimination case, the court upheld the sufficiency of the evidence for a finding of notice to higher management without identifying who qualified as higher management. Additionally, in *Davis v. Monroe County Bd. of Educ.*, 74 F .3d 1186, 1195 (11th Cir. 1996), a panel of the Eleventh Circuit held that a school principal constituted "higher management" of the County Board of Education. The full court has now granted rehearing en banc and vacated the panel's opinion. 91 F.3d 1418 (11th Cir. 1996).

(continued...)

Whatever pattern appears from these cases provides little help to the Court in the present case. In each of these Eleventh Circuit cases, the defendant corporation or state agency was significantly larger than V & M, and had multiple levels of managerial officers. V&M is a Subchapter S corporation with an average of sixty employees at any one time. Nix Depo. at 6-7. Mr. Nix makes all the hiring and firing decisions. Although Mr. Sutton would handle initial complaints regarding sexual harassment, Ms. Graff does not dispute that Mr. Nix instructed his female employees to report incidents of sexual harassment to him personally if reports to Mr. Sutton failed to ameliorate the conditions. The closeness and informal operation of V & M distinguishes it from any of the Eleventh Circuit cases cited above. An analogy between V & M and Shoney's, Pizza Hut, Monroe County, Southern Bell, and The State of Alabama would doubtlessly prove fruitless.

The determination of who counts as higher management must turn not only on the size of the corporation, but on the degree to which the highest manager in the corporation delegates the role of ombudsman to subordinates. The "higher management" inquiry evidently is calculated to place liability on the corporation when a person in the corporation who could have terminated the inappropriate behavior learned of the behavior but failed to bring it to an end. In this case, two factors compel the conclusion that Mr. Sutton was not "higher management." First, because he lacked the authority to fire the Sargent brothers, he had limited power to bring an end to their alleged misbehavior. Stern

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[8](...continued)

reprimands are poor substitutes for pink slips. Second, Ms. Graff herself seemed to recognize that her complaint ultimately should be lodged with Mr. Nix himself. After complaining three times to Mr. Sutton, she went to Mr. Nix and complained of her mistreatment, as Mr. Nix had instructed her to do. Under these circumstances, the Court holds that, as a matter of law, Mr. Sutton was not higher management for purposes of imputing notice to V & M.[9]

Plaintiff complains that she attempted to contact Mr. Nix prior to the August 15 meeting, and that he delayed scheduling a meeting with her. However, the record clearly indicates that Ms. Graff spoke with Mr. Nix during, the time period when she allegedly was being sexually harassed, and that she did not raise the issue of sexual harassment to him at that time. Graff Depo. at 5 1. Accordingly, the Court will consider August 10 of 1994, when Mr. Sutton contacted Mr. Nix regarding the alleged rape threat, Nix Depo. at 46, as the date on which V & M first received notice of the sexual harassment charges. Based on this holding, the Court can quickly dispose of plaintiff's argument that V & M's response to the charges was insufficient.

At the time Mr. Nix first received notice of

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[9] If Mr. Sutton was not higher management, Dave Sargent, a foreman, clearly was not higher management either. Also, at oral argument counsel for plaintiff suggested that Ms. Graff had addressed her complaint to Mr. Nix's daughter during a telephone conversation, and that this should count as notice to the corporation. The record, however, does not indicate that Mr. Nix's daughter was employed by V & M in any capacity that would make her "higher management" of the corporation, and the mere fact that she was related to Mr. Nix cannot make up for this deficiency.

plaintiff's allegations, he was away on vacation, and took the only reasonable action under the circumstances — separating Ms. Graff from the Sargent brothers until his return. Upon his return, he met with Ms. Graff, and heard her version of the story. The Court believes that the inquiry into the appropriateness of V & M's response must end there. Although plaintiff criticizes Mr. Nix's subsequent investigation into her charges, the Court fails to understand the relevance of this allegation. After the August 15 meeting, Ms. Graff left on vacation and never returned to work at V & M. Even assuming that the company's response was completely inappropriate, and never returned to work at V & M. Even assuming that the company's response was completely inappropriate, it never impacted on the "compensation, terms, conditions, or privileges" of plaintiff's employment when she was not longer on the job to reap the possible benefits of remedial action. Ms. Graff voluntarily terminated her employment with V & M before the company even had time fully to investigate her claims, much less to remedy the situation. *See Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir. 1996) (Where employee put employer on notice of her sexual harassment complaint the same day she quit work, employer could not be liable, because it had no opportunity to take prompt and remedial action.). Because none of the sexual harassment allegedly experienced by Ms. Graff resulted from a failure by V & M to provide a workplace free from sexual harassment, she may not hold V & M liable for a violation of Title VII.

B. The Common Law Claims

Having granted summary judgment on the Title VII claim, and the identical FCRA claim, the Court will dismiss the remaining common law counts without prejudice. *See United Mine Workers v. Gibbs*, 383 U.S.

715, 726 (1966) ("[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."); *see also Hardy v. Birmingham Bd. of Educ.*, 954 F.2d 1546 (11th Cir. 1992) (District Court, abused its discretion in failing to dismiss pendent state law claims after granting summary judgment on section 1983 claim). Although some of the counts raise *respondeat superior* issues analogous to the ones raised in the statutory counts, the negligent training and retention count would move the Court into an inquiry completely separate from the one required by the statutory counts. Recognizing that "[s]tate courts, not federal courts, are the final expositors of state law," *Hardy*, 954 F.2d at 1553, the Court will not entertain the pendent common law counts.

CONCLUSION

The Court has considered the motion, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that

1. Defendant's Motion for Summary Judgment **[DE 24]** be, and the same is hereby **GRANTED as to Counts I and II of the Complaint.** Final Judgment shall be entered by separate Order;

2. Plaintiff's Motion to Strike **[DE 45]** be, and the same is hereby **DENIED.**

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 19 day of March, 1997.

Supreme Court, U.S.
FILED
JUL 16 1998
OFFICE OF THE CLERK

(2)

No. 97-2051

In The

Supreme Court of the United States

October Term, 1997

DENISE GRAFF,

Petitioner,

vs.

V & M ERECTORS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner/Plaintiff Denise Graff ("Ms. Graff") filed suit in the United States District Court for the Southern District of Florida on allegations that she had been sexually harassed by co-workers while employed with Respondent/Defendant V & M Erectors, Inc. ("V & M"). Before entry of the summary judgment against Ms. Graff, a considerable body of discovery was taken and filed with the District Court.

The statement of the case provided in the petition is misleadingly one-sided and unduly abbreviated in its depiction of the record. It also recites matters that are not supported by record evidence. For example, the claim that Ms. Graff's problems at V & M began almost immediately after she began work is refuted by her testimony that things were fine for the first five weeks she worked there. Also, the only support for the contention that Dave Sargent did not want to work with women was inadmissible hearsay. The petition also fails to fairly recount Mr. Nix' meeting with Ms. Graff.

Accordingly, it is necessary for this brief in opposition to provide a more complete and accurate account of the record. This record, resolving all disputes in favor of Ms. Graff, presents the following undisputed facts:

V & M is in the business of steel erection, and generally employs 40 to 60 workers. Vern Nix is its sole officer, director, and shareholder. V & M is a qualified minority business enterprise, heavily dependent on government contracts. If V & M failed to respond appropriately to claims of sexual harassment, its government work would be at risk.

V & M has only had one complaint, Ms. Graff's, of sexual harassment. V & M currently employs three women (excluding office personnel) who have worked without incident.

Mr. Nix testified that V & M does not condone discrimination or harassment on any basis, and that special care is taken to protect against sexual harassment:

> I have my own policy, verbal policy. If anybody ever felt they were discriminated against or had a problem on the job, they were encouraged to come and see me about it or call me and tell me what's going on.
>
> . . .
>
> This was done anytime I hired a female employee. I always went out of my way to talk to the female employees as to the working environment, and if she was familiar with the working environment, along with some communication regarding if she had a problem and was not being treated fairly or whatever or discriminated, harassed, she was to get in touch with me.

Mr. Nix follows this up by being accessible to workers, including visiting job sites and asking workers whether they have any problems. He further testified that female workers receive special attention because of the participation levels required of highway contractors by the federal government.

These policies were followed as to Ms. Graff. Mr. Nix asked Ms. Graff to let him know if she had any problems with her co-workers. As soon as he became aware of Ms. Graff's complaints of harassment, Mr. Nix directed that

she be removed from working alongside Ray or Dave Sargent, and thoroughly investigated her claims.

Ms. Graff had learned of V & M during her prior job doing iron work on bridges. She began working for V & M in April of 1994 as an apprentice iron worker.

Ms. Graff recalls that she first met Vern Nix in May of 1994, after about five weeks on the job. When she first met Vern Nix, Ms. Graff was on a project on which Dave Sargent was foreman. He asked her how she was doing, and she said "fine." Despite telling Mr. Nix things were fine, Ms. Graff testified that she found Dave Sargent "cold." "It was a very cold environment, very uncomfortable."

By all accounts, Dave Sargent does have a gruff personality. Ms. Graff had seen him being stern with other workers, and others testified similarly. V & M foremen are not executive/managerial type employees in white shirts and ties, but are working foremen doing the same kind of work as Ms. Graff.

Ms. Graff complained that Dave Sargent:

> didn't like me using the bathroom. I wasn't doing the work right because . . . I didn't know how to tie yet, and its hard to learn. It takes a couple of weeks to get to be able to do the work comfortable . . . and know what you're doing, especially when it comes to tying because you spend a lot of time tying.

However, Ms. Graff claims experience in doing iron work at her prior employment, and had been doing this work at V & M for approximately five weeks before she had

been moved to work with Dave Sargent. And she was obtaining assistance from other co-workers.

Regarding the disputation between Dave Sargent and Ms. Graff over bathroom use, Ms. Graff testified:

> I had to get my vehicle and drive to the bathroom because they didn't have the proper bathroom use on the job site. So we – I, as a female, would have to get my vehicle and leave the job site to go the bathroom.
>
> Q. Okay, because they didn't have a portalet in there?
>
> A. Well, they had them, but they're very filthy. They were filled, very disgusting.
>
> Q. Okay. Did Dave feel like you should just use that portalet?
>
> A. Yes.
>
> . . .
>
> Q. Okay. And so for the rest of the time that you were employed with Dave, you just used the portalet that was there in the area when you had to use the restroom?
>
> A. No, I'd still leave.
>
> Q. . . . [E]ven though he told you that you couldn't leave, you left anyway?
>
> A. Exactly.

Ms. Graff further complained that her working environment while on Dave Sargent's crew was unsafe in various respects. Ms. Graff complained about these matters to V & M employee Jimmy Sutton, and saw that Mr. Sutton

then approached and spoke with Dave Sargent, but she did not hear what was said.

Ms. Graff's primary complaint about Dave Sargent concerned his failure to control his brother, Ray Sargent. Ms. Graff testified that after she complained to Jimmy Sutton, Ray began verbally abusing her, brushing against her, and grabbing at her. As she further testified:

> I asked Dave . . . I didn't ask Dave. I told Dave, "Dave, I don't appreciate Ray speaking to me like that, and I don't appreciate him touching me because he has no right. Dave, "I'll take care of the problem." It was never taken care of. It just got worse.

This conversation took place after Ray Sargent ran up to her, grabbed her buttocks, and laughed and ran away. This was the first time that Ray Sargent did anything Ms. Graff found offensive.

Ms. Graff testified that, other than Dave and Ray Sargent, she got along with her co-workers. She testified that on one job:

> Ray tried to grab my buttocks again, and Dave and Jose took up for me that time and said, "Ray, keep your F-ing hands off her now."
>
> Q. Dave said that?
>
> A. Dave and Jose both. Jose was constantly telling Ray to keep his hands off me.

Ms. Graff testified that Ray Sargent "touched me . . . probably six, seven times. That's brushing up against me."

Ms. Graff further complained that Ray Sargent used offensive language around her and tried to engage her in discussions about sex. She testified that much of the harassment by Ray Sargent took place when others could not witness it.

Ms. Graff also testified that Ray Sargent once came up behind her and grabbed her breast. She responded by getting Jimmy Sutton's phone number from Dave Sargent and calling Mr. Sutton, who told her that Vern was out of town and so he (Sutton) would take care of it. "He called me back later that evening, and told me he went to Ray and Dave's house, and told them to keep their F-ing hands off me and their mouth." According to Ms. Graff's personal notes, this occurred on July 12, 1994.

Mr. Sutton described his job responsibilities with V & M as follows:

> Q. What does a superintendent do?
>
> A. As little as possible.
>
> Q. If I ask Mr. Nix what he does, what would he say?
>
> A. Made sure the jobs are running okay and tracking the materials.
>
> Q. Do you assign particular persons to work on particular jobs?
>
> A. No. He did.
>
> Q. Did you hire or fire?
>
> A. Nope.

If anyone did not show up for work, Mr. Sutton would call Vern Nix to find out what to do. In the event that Mr.

Nix could not be reached, Mr. Sutton did have limited authority to call someone in on the job if necessary. Although he had no real management authority, Mr. Sutton did respond to the limited knowledge he had of the matters complained of by Ms. Graff, first by speaking with the Sargents and directing them to behave appropriately with regard to Ms. Graff, and later by taking Ms. Graff's more serious allegation directly to Mr. Nix.

Although V & M time records show that Ms. Graff did not work August 2, 1994, she testified that she did work that day. When Jimmy Sutton called Ms. Graff and asked why she had not worked, she responded that she had worked on a bridge with Ray Sargent. Ms. Graff had her dispute over payment fixed by calling Vern Nix, who told her that he would look into it "[a]nd he did and found out that I did work that day."

Ms. Graff's early August conversation with Mr. Nix took place after each of the above-discussed events had allegedly occurred. During this conversation she did not mention any of the problems she was having, and concerned herself only with making sure she would get paid for that day. Ms. Graff also testified that she spoke to Mr. Nix on other occasions when he would move her to another job if needed, and the time records show that such transfers were not infrequent.

Ms. Graff's most ominous charge allegedly occurred shortly after her early August talk with Vern Nix, and near the end of her employment. She testified that the best evidence of the date is her handwritten notes stating that the incident occurred on Thursday, August 11, 1994, at 11:00 a.m. As Ms. Graff testified:

> A. He [Ray Sargent] said – he goes, "If you don't straighten up and quit having an attitude," he says, "I'm going to F-ing rape you. I'm going to fucking rape you."
>
> Q. Okay. Did you respond to him at all when he said that?
>
> A. I said, "Oh, you think so, huh? You and whose army?"

Then she got in her truck and left. There were no witnesses.

Ms. Graff then insisted that Jimmy Sutton contact Vern and do something about it. Ms. Graff "took it to Jimmy because [she] knew Vern was out of town." Mr. Sutton brought the issue to Vern Nix' attention, and Ms. Graff was moved to the Golden Glades project.

Ms. Graff testified that after she was moved to Golden Glades, Ray and Dave Sargent came there and Ray drew a picture of male and female genitalia on a plank, and labeled these with his name and Ms. Graff's name. Ms. Graff saw this at the end of the day. At this time she was done working for the day, and went home.

Mr. Nix first became aware of Ms. Graff's complaints by a telephone call from Jimmy Sutton. As he testified:

> A. Jimmy – I was away on vacation somewhere. I don't recall. He had called me and told me that Denise was alleging sexual discrimination and harassment from Dave and Ray, and she wasn't being treated fairly and so forth and so on.
>
> I asked him if he felt it was serious, and he said, Yeah.

> And I said, Here's what I want you to do. I advised him by phone to separate Denise from working with Dave and Ray, to work on other job sites . . . to call Dave and Ray and advise them that Denise had complained about sexual harassment and discrimination, . . . and that's what I was going to do, separate them. I took this very seriously, and I would address it when I returned.
>
> I also told him at the time to call Denise and advise her of the same, that she would not be working with Dave or Ray until I returned, and when I returned, I would be in contact with her, that this type of attitude was not condoned by my company, either on a company level or personal level. It was to be taken very seriously, and I would be in touch with her also when I returned.
>
> And I think I even asked him if Denise has a problem with that, he was to call me back and let me know. I didn't receive a phone call. . . .
>
> Q. She went to work and was separated from Dave and Ray?
>
> A. She went to work on another project. . . . I believe it was Golden Glades. . . . I know on the following Monday when I returned, she was at Golden Glades.

On his return, Mr. Nix called Ray Sargent and Dave Sargent. He advised each that he had learned of complaints by Ms. Graff, that sexual harassment would not be condoned, and that he would question each of them the next day.

Ms. Graff admits that she first complained to Mr. Nix in August, when he met her at a job site in a construction

trailer. She told Mr. Nix that "Ray had grabbed me and threatened to rape me;" and that "I've taken enough of his verbal abuse . . . and him grabbing at me when he was told not to do it." In response, "Vern told me to quit crying, that he'd take care of it. He said he'd take care of the problem."

Vern Nix told Ms. Graff that he would investigate her charges. She identified Jose Saez, Maria Soldano, Rick Schirman, and Robert Theyson as witnesses. Vern Nix also told Ms. Graff that she would not work with Ray or Dave Sargent while his investigation went forward.

Vern Nix took notes of the meeting. With minor exceptions, Ms. Graff confirmed that the notes were accurate. According to these notes, Mr. Nix went to the Golden Glades project on Monday, August 15, 1994 to meet Ms. Graff, who stated:

- Ray and Dave treated her like dirt and did not try to teach her anything.
- they tried to hurt her and overload her to make her quit.
- they verbally abused her and yelled at her a lot.
- Ray physically grabbed her on several occasions and continuously made sexual comments.
- stated she was in fear of her life and afraid of getting raped or hurt.
- dreaded going to work everyday.
- went home early on several occasions because she couldn't take it anymore.

- stated she wanted something done about this immediately.
- she let me know that if I did not do anything about this she stated she would file a complaint. [Ms. Graff does not recall threatening to file a complaint, but did say she would have to "do something about it" if Vern Nix had not taken care of the problem before she returned].
- I advised her if she wanted to file a complaint, she was within her rights to do so. However, I considered this to be an official complaint and would record it as such in our files.
- she told me she was going away on Wednesday 17th August, 1994 and would return to work on Tuesday 23rd August and would like this resolved by then.

The notes continue by recounting Mr. Nix' comments to Ms. Graff:

- I apologized for the occurrence of this situation. [Ms. Graff does not recall that Mr. Nix apologized].
- I stated thst [sic] this was not condoned nor tolerated by this company.
- I told her that I would be interviewing her, Dave and Ray.
- I asked her for names, so I could further investigate. She gave me the following names: Jose Saez, Maria Soldano, Rick Schirman and Robert Theysen.
- I told her that I would not only talk to these individuals, but would speak with other V &

M employees who have worked around the three of them. Also, I intended to interview some of the prime contractors' employees on jobs which three of them have worked together.

- I told her that I considered this to be the correct and fair way to handle this and asked her to give me a little time to do this. I told her in the interim I would not work them on the same project. I also advised her, if she had any incidents occur during this time, to let me know immdeiately [sic]. [Ms. Graff does not recall him saying this last sentence].

- I told her if I found through my investigation that her allegations are confirmed, that I had no problem terminating both Ray and Dave. However, if I could not confirm her allegations, or there was more to this situation, I would inquire as to what further procedures are to be used to deal with this probelm [sic]. I assured her this issue would not be sidestepped and I would continue to take the appropriate action in resolving this situation.

At the end of the meeting, Ms. Graff said that she was "going home," and would return on August 23rd and wanted it taken care of by then. She never came back.

Ray and Dave Sargent denied and continue to deny Ms. Graff's allegations. Thus V & M was faced with contradictory claims.

After meeting with Ms. Graff, and interviewing Ray and Dave Sargent, Mr. Nix reviewed V & M's time sheets to see who else worked around Ms. Graff and the Sargents, so as to interview others. Mr. Nix then interviewed

V & M employees: Jose Saez, Robert Theyson, Jorge Tous, Bill Meisenholder, Dan Davids, Maria Soldano, and John Sargent; and Balfour Beatty[1] employees: Keith Wagner, Clyde Stokes, Jr., and Rex Boder; all of whom failed to corroborate the central allegations of Ms. Graff's claims. Those interviewed generally reported mutual use of abusive language by Ms. Graff and Ray Sargent, but none "had any knowledge or never saw Ray or Dave abuse her, grab her or touch her." Mr. Nix documented his investigation by having each interviewee confirm a written statement.

Mr. Nix heard many comments controverting Ms. Graff's claims. Jose Saez reported:

> 1. Ray and Denise both participated in strong conversations a lot.
>
> 2. I thought that Denise wanted to fuck Ray.
>
> 3. Denise used string [sic] language a lot, not just around [sic] Ray.
>
> 4. Denise did not like to take instructions from anyone.
>
> 5. Dave did not cut her any slack because she was a female, he expected her to do the same as everybody else.
>
> 6. I feel that both Ray and Denise were out of line.

Robert Theyson had "observed Ray and Denise exchanging argumentative type conversation with each other

---

[1] Balfour Beatty employees were also working on the same sites in the vicinity of Ms. Graff.

throughout the day. I thought it was their type of relationship." Jorge Tous also saw "a lot of strong comment back and forth" Bill Meisenholder stated that Ms. Graff: "had a real attitude. She went off on me. . . . She would not listen or take instructions from me. I wasn't her boss. . . . She used foul language telling me off."

Maria Soldano, a female ironworker who worked around Ms. Graff and the Sargents, told Mr. Nix:

> 1. Denise is trouble and you should get rid of her.
>
> 2. Denise and Ray spoke to each other making sexual comments about each other all the time.
>
> 3. Denise should not be complaining about the way Ray talked to her because of the way she was on the job.

John Sargent added to the chorus that: "Denise has a foul mouth and is very vocal [and] didn't take direction good."

Balfour Beatty's employees gave similar information. Clyde Stokes, Jr., commented that:

> 1. Ray's and Denise's conduct was way out of line. They both used extremely [strong] language with each other containing sexual comments and derogatory remarks to each other.
>
> 2. On one occasion I spoke to them about toning it down.
>
> 3. This type of conduct was on a continual basis.
>
> 4. Felt both were equally guilty of participating and instigating the conversations.

Balfour Beatty employee Rex Boder added that "[b]oth were involved in participating in improper conduct, both made sexual and derogatory comments to one another on a continual basis."

From his investigation, Mr. Nix could not substantiate Ms. Graff's charges. If her claims had been corroborated, he would have fired Ray Sargent, and fired or severely reprimanded Dave Sargent. Of course, V & M's employees, including the Sargents, understood that the behavior alleged by Ms. Graff was not tolerated, and there would have been serious reprisals if her claims had been found true.

On August 22, 1994, Vern Nix sent Ms. Graff a letter advising that the Department of Transportation ("DOT") was responsible for investigating complaints such as hers, and that she should call DOT's Ed Frasier for this purpose. The letter also confirmed Mr. Nix' August 15 meeting with Ms. Graff, and advised that he had already conducted several interviews. Ms. Graff did not call Mr. Frasier, but a week later she received a call from him, and was called in for an interview.

DOT investigated Ms. Graff's charges, and found after interviewing 18 persons that no one could corroborate her claims. The report notes that Ms. Graff "refused to cooperate further when requested to appear in order to offer clarity with regards to her 'eye witnesses.'"

Ms. Graff filed a charge of discrimination, but the Broward County Human Rights Division also found no probable cause to believe there was a violation. EEOC also determined that "the evidence obtained during the

investigation does not establish a violation of the statute."

Ms. Graff first filed suit against V & M in state court, but dismissed this action shortly before a scheduled summary judgment hearing. Ms. Graff's federal action came for a summary judgment hearing on March 12, 1997. At the hearing, the District Court advised both parties that because *Faragher v. City of Boca Raton*, 76 F.3d 1155 (11th Cir. 1996), had been vacated for en banc review, the parties should argue their positions without reliance on this case. Thereafter, the court entered summary judgment in favor of V & M as to Counts I and II, and dismissed the remaining state law claims pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Ms. Graff appealed. By the time of oral argument before the Eleventh Circuit, certiorari had been granted by this Court to review the en banc decision in *Faragher*. *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc). Accordingly, the panel advised the parties to argue as if *Faragher* did not exist. Counsel for V & M stated that this was easily done because the same restrictions had been imposed by the district court at the hearing on the motion for summary judgment. Thereafter, the district court's ruling was per curiam affirmed "based on the district court's well-reasoned order filed on March 19, 1997." Ms. Graff's request for rehearing or rehearing en banc was denied.

REASONS FOR DENYING THE WRIT

Ms. Graff seeks certiorari review on the contention that the decisions of the district court and of the Eleventh Circuit below conflict with decisions from other courts. In the first place, the rulings in this case readily reconcile with the authorities cited as conflicting. Secondly, any need for resolving the prior confused state of sexual harassment law has been thoroughly addressed during the 1997 term. Third, the summary judgment entered against Ms. Graff is entirely correct under this Court's most recent sexual harassment decisions. And finally, the reasons for granting certiorari should be reduced where, as here, the district court's ruling is unpublished, and the unanimous affirmance of that ruling is per curiam and unpublished.

I. There Is No Conflict.

Ms. Graff contends that the judgment against her conflicts with legal principles stated in *Bonenberger v. Plymouth Township*, 132 F.3d 20 (3rd Cir. 1997); *Young v. Bayer Corp.*, 123 F.3d 672 (7th Cir. 1997); *Torres v. Pisano*, 116 F.3d 625 (2nd Cir. 1997). Her position fails to withstand close scrutiny.

Bonenberger involved a female police dispatcher who suffered harassment from a supervising sergeant, which was at times committed in front of numerous other supervisory officers. The fact that management level officials knew of the harassment for almost two months before the department's investigation defeated the otherwise sound defense that an adequate investigation commenced once the harasser's supervisor learned of the harassment. 132

F.3d at 26. The department could not benefit from its harassment policy because that policy did not specify a grievance procedure. *Id.* at 27.

Ms. Graff, however, has never alleged harassment committed in front of other management level employees. She testified that much of the harassment occurred with no witnesses. When harassment occurred in front of other co-workers, they would rush to her defense. Just as importantly, no one at V & M had any management level authority other than Vern Nix, who was the only person who could hire or fire, and who scheduled all work assignments.

In addition, Mr. Nix told Ms. Graff that if she had any problems of harassment or discrimination, she should bring them to his attention. She never did. She did not raise these alleged problems even when, shortly before she quit, she called him on his mobile telephone to get a pay matter corrected. Thus V & M's grievance policy was, in contrast with that in *Bonenberger*, clear. Ms. Graff simply failed to take advantage of it by discussing these issues with Mr. Nix.

Young involved complaints made to the plaintiff's department head, who oversaw more than sixty employees. The court held that such a person was required to either resolve harassment complaints or refer the matter to someone within the company who would. 123 F.3d at 674. That was especially true because the department head was, under the company's harassment policy, one of the authorized channels for making a complaint. *Id.* at 675.

Again, no one at V & M has authority remotely approaching that of the department head in *Young*, other than Vern Nix. Secondly, Ms. Graff knew that she had access to Mr. Nix under the policy that he personally told her about, and she failed to take advantage of that policy even when she spoke with him on a pay dispute shortly before quitting.

Torres, also cited in the petition, quotes a district court opinion suggesting that a nonmanaging employee's knowledge may impute if that employee is charged with substantial responsibility for relaying employee complaints to management, especially where management is otherwise inaccessible. *Id.* at 637 (quoting *Lamb v. Household Credit Servs.*, 956 F.Supp. 1511, 1517 (N.D. Cal. 1997)). The circumstances described in *Torres* are absent here. First, Mr. Nix was accessible. Ms. Graff had each of Mr. Nix' telephone numbers, and had spoken to him not two weeks before she quit her job and failed to raise the allegations of harassment. Second, there is no person at V & M whose substantial responsibility is in relaying employee complaints to management.

Even considering the cases selected by Ms. Graff, the summary judgment entered here would have been affirmed. V & M made an exemplary response once Ms. Graff's allegations came to the attention of Mr. Nix, its only management level employee, and Ms. Graff could have brought the matters to the direct attention of Mr. Nix in early August, when she called him on a pay issue, but she failed to mention her alleged difficulties. Given

these undisputed facts, this case does not present any clear conflict with the cases cited by Ms. Graff.[2]

V & M does not pretend that the Courts of Appeal have exhibited perfect uniformity in their approaches to imputed knowledge from lower or mid level employees to the employer. Some cases do not easily reconcile. To the extent that these differences were over announced principles, rather than over marginal differences in application of these principles, such discrepancies should be resolved by the newest cases this Court has issued on sexual harassment issues. Thus, the conflict concerns raised in the petition do not go to matters which are likely to reach into the future.

II. Sexual Harassment Law Is Now Adequately Clarified.

Up until this Court's most recent term, the confused state of sexual harassment law provided "compelling reasons," within the meaning of Rule 8, for the Supreme Court to enter the field in order to clarify the standards of liability. In a trio of new decisions however, substantial clarity has now been brought to this area of law. See *Faragher v. City of Boca Raton*, 1998 U.S. LEXIS 4216 (U.S. June 26, 1998); *Burlington Industries v. Ellerth*, 1998 U.S. LEXIS 4217 (U.S. June 26, 1998); *Oncale v. Sundowner Offshore Servs.*, 118 S.Ct. 998 (1998).

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[2] If there should be any cases which would allow liability under such facts, they are no longer good law in light of the new Supreme Court cases on sexual harassment law, as discussed in the next two sections of this brief in opposition.

The Court's new cases, and in particular *Faragher* and *Ellerth*, now provide authoritative references answering not only the specific questions there presented, but also outlining the process by which answers to other sexual harassment issues might be determined. These opinions, together with the general law of agency as outlined in the Restatement, now set the framework through which all succeeding claims of sexual and other forms of workplace harassment must be analyzed.

The Supreme Court has thus satisfied the pre-existing need for improved clarity. Having explicated the law of sexual harassment in such a treatise-like manner, the Court's resources could surely now be turned to any number of the thousands of other requests for review which are competing with Ms. Graff's petition. If, in the passage of time, there should again develop confusion in the application of sexual harassment law, a future term will be soon enough to identify and resolve these inconsistencies. Presently, however, America's courts, attorneys, employers, and employees have been given the clarification that had been needed, and there is no apparent need for further action on the part of this Court.

III. V&M's Judgment Is Correct Under *Faragher* and *Ellerth*.

Faragher and *Ellerth* announce a defense to claims of sexual harassment by a supervisor where it is shown:

> (a) that the employer exercised reasonable care to prevent and correct promptly on sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage

> of any preventive or corrective opportunities or to avoid harm otherwise.

Faragher, 1998 U.S. LEXIS at *59-*60; *Ellerth*, 1998 U.S. at *41-*42. The undisputed facts here present both elements of this defense.

First, the record is undisputed that Mr. Nix personally advised Ms. Graff that she should let him know if she had any problems with discrimination or harassment. The record further shows, without dispute, that as soon as Mr. Nix learned of Ms. Graff's allegations, he responded promptly and correctly. Mr. Nix learned of her complaint on August 10, 1994, while he was on vacation. He directed that the involved employees be separated. The next Monday, he personally interviewed Ms. Graff, Ray Sargent, and Dave Sargent. Over the next few days he personally interviewed numerous others in order to gather information to try and determine whether to believe Ms. Graff's allegations or the Sargents' denials. Mr. Nix even caused V & M to be investigated by the Department of Transportation.[3]

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[3] Ms. Graff has complained that these efforts should be discounted because no one was reprimanded. But her allegations were denied, and no one would corroborate them. Every investigation of Ms. Graff's allegations – by Vern Nix, by the Department of Transportation, and by the Broward County Human Rights Division – each concluded that her claims were unproven. Where an employee claims harassment, the claims are denied, and a good faith investigation shows that the complaint was either an exaggeration or a complete fiction, surely the employer is not subject to liability for failing to punish the exonerated party.

The record also is undisputed that Ms. Graff failed to take advantage of Mr. Nix' policy of making himself personally available to hear complaints of discrimination or harassment. We know from Ms. Graff's own testimony that Mr. Nix was readily accessible to hear and act on such complaints. She spoke with him not long after she started working on the crew where she suffered the alleged harassment, and told Mr. Nix that things were fine. She also testified that she spoke with Mr. Nix on several occasions regarding scheduling issues. It should be kept in mind that she only worked for V & M for just over three months, and so these various contacts were all over a relatively short time period.

Ms. Graff further testified that on August 2, 1994 – less than two weeks before a full in-person meeting with Mr. Nix on her harassment complaints – she learned that she was not on record for working that day. As she testified:

> Q. How did you get that fixed?
>
> A. I called Vern.
>
> Q. And what did you tell Vern.
>
> A. I told Vern that I was there at work, and he said he'd have to look into it. And he did and found out that I did work that day.
>
> Q. Okay. Do you know what he did to look into it?
>
> A. No, I don't.
>
> Q. Did he call you back later to tell you that? What –

> A. No, he just gave it to me on my next paycheck.

Ms. Graff was able to call Mr. Nix to raise this issue because she had the numbers to his mobile phone, his office, and his home.

If she was suffering the levels of harassment from her co-workers as she subsequently came to allege, Ms. Graff clearly could and should have made this known to Vern Nix on August 2, 1994, or on any of the other occasions that she spoke to him prior to that date. As the district court noted, "the record clearly indicates that Ms. Graff spoke with Mr. Nix during the time period when she was allegedly being harassed, and that she did not raise the issue of sexual harassment to him at that time." That she did not is uncontroverted proof that she could have brought her difficulties to V & M's attention sooner, but failed unreasonably to do so.

Accordingly, each element of the *Faragher/Ellerth* defense is established on the record as a matter of law. Rather than suggesting a possibly different result, these new decisions soundly confirm that the judgment against Ms. Graff is correct.[4]

---

[4] The petition also contends that the district court erred in recognizing that the size and chain of command of a small company, where all management authority resides in one individual, should affect analysis of whether an employer may be held liable for harassment among co-workers. This ingredient of the district court's opinion, however, finds direct support in *Faragher*, where this Court stated:

> Unlike the employer of a small workforce, who might expect that sufficient care to prevent tortious

IV. Unpublished Per Curiam Rulings Are Less Attractive for Review.

Finally, the discretion of a Justice in deciding whether to vote for certiorari review might reasonably consider whether the rulings below have been published. Published decisions with erroneous reasoning risk spreading that error throughout the land, causing incorrect rulings affecting untold others. Published decisions are also more attractive targets for review as they are more likely to bring a thoughtful and thorough written explication of the issues and the analysis of them, thus providing a strong base from which this Court may begin its work. On the other hand, unpublished per curiam rulings often lack a thorough written justification, do not stand as precedent, and have little chance of affecting litigants beyond the parties to that specific case.

Here, no decisions have been published. The Eleventh Circuit's ruling does no more than incorporate the rationale of the district court's opinion, and so any

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> behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of the many departments in far-flung locations could be effective without some formal policy against harassment, with a sensible complaint procedure.

Faragher, 1998 U.S. LEXIS at 62. Thus, the district court was correct in recognizing that the obligations of the employer to control sexual harassment reasonably depend upon the size and chain of command of the employer, and what is reasonable for a small enterprise like V & M may not necessarily be appropriate for IBM or General Motors.

review by this Court would have only the expressed thoughts of the district court from which to begin, without the assistance of further writing from appellate judges. Because the rulings here are not likely to affect others, and because the only written analysis to work from in considering the issues Ms. Graff wants to raise is that of the district court, certiorari review is inappropriate.

CONCLUSION

Based on the foregoing, V & M requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

DENISE GRAFF,

Petitioner,

vs.

V&M ERECTORS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF ON CERTIORARI

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PETITIONER'S REPLY BRIEF ON CERTIORARI

DISCUSSION

1. THERE IS CONFLICT AMONGST THE CIRCUITS ON THE ISSUE THAT PETITIONER RAISES, I.E., IN A HOSTILE-ENVIRONMENT EMPLOYMENT DISCRIMINATION CASE, TO WHOM MUST A PLAINTIFF COMPLAIN IN ORDER TO IMPOSE

RESPONDEAT SUPERIOR LIABILITY ON THE EMPLOYER.

Respondent acknowledges that Petitioner complained to V&M superintendent Jimmy Sutton about her treatment on Dave Sargent's crew, Brief in Opposition at 4, and that Sutton took the allegations to Vernon Nix, *id.* at 7, the sole officer, director and shareholder of Respondent, *id.* at 1, "the only person who could hire or fire," *id.* at 18, only after making an ineffectual attempt to remedy the situation himself. Respondent nonetheless argues that the company should escape liability for the treatment of Petitioner by the Sargent brothers because there was no awareness of the harassment by "management" higher than Sutton. *Id.* This argument – the position taken by the district court — is consistent with, and a logical extension of, the "higher management" doctrine espoused by the Court of Appeals for the Eleventh Circuit in *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997) (reversing summary judgment on constructive-knowledge grounds, but affirming that because the plaintiff had failed to complain to company officials "for Tyson to be liable under Title VII for hostile environment sexual harassment, the alleged harassment must have been so pervasive that Tyson is deemed to have constructive knowledge of it") (citing *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538 (11th Cir. 1997) (en banc)[1]); *Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860, 866 (11th Cir. 1997) (also citing *Faragher*, 111 F.3d at 1538); *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996); *Cross v. State of Alabama*, 49 F.3d 1490, 1507 (11th Cir. 1995), and

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[1] This Court reversed the Eleventh Circuit and remanded for reinstatement of the district court judgment. *Faragher v. City of Boca Raton*, Case No. 97-282 (June 26, 1998).

Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988). *See also Splunge v. Shoney's, Inc.*, 97 F.3d 488, 488-489 (11th Cir. 1996) (categorizing as "lower management" everyone below the level of the regional director of a restaurant chain and affirming liability verdict only because evidence supported a finding of constructive knowledge by "higher management" because of failure to post a sexual harassment policy).

Respondent's attempt to reconcile the district court's reasoning (and, per force, the reasoning of the panels in *Allen*, *Reynolds*, *Splunge*, *Kilgore* and *Huddleston*, as well as that of the *en banc* majority in *Faragher*) and that of the other circuits in *Young v. Bayer Corp.*, 123 F.2d 672 (7th Cir. 1997) is unavailing. For example, Respondent attempts to aggrandize the department head in *Young*, arguing that "no one at V & M has authority remotely approaching that of the department head in *Young*, other than Vern Nix." Brief in Opposition at 19. Bayer Corp., meanwhile, sought exactly the opposite spin, "argu[ing] absurdly, in the teeth of its own policies as well as of good sense, that in a corporation the size of Bayer the head of a department of 'only' 60 workers is too far down the corporate ladder to count." *Young*, 123 F.3d at 675. As the *Young* court observed, significantly for the case at bar: "Most companies do not have as many as 60 workers." *Id.*

What is important in comparing *Young* and the case at bar is not the size of the company, or the relative rank of the supervisors, but rather the way in which the *Young* court formulated and answered the crucial question.

Question: "The plaintiff's appeal presents an important question: what is the lowest level in a

corporate or other institutional hierarchy at which notice to an employee of sexual harassment is deemed notice to the employer?" 123 F.3d at 672-673.

Answer: "[W]hat is possible to identify is who has the authority to terminate the harassment of which the plaintiff is complaining and did the plaintiff complain to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it. These two questions should guide the inquiry in cases in which the question is whether the plaintiff placed her complaint in a proper channel." 123 F.2d at 675.

That is in sharp contrast to the district court's application of what it understood as the Eleventh Circuit's "higher management" rule, especially as applied to smaller employers:

> The determination of who counts as higher management must turn not only on the size of the corporation, but on the degree to which the highest manager in the corporation delegates the role of ombudsman to subordinates. The "higher manager" inquiry evidently is calculated to place liability on the corporation when a person in the corporation who could have terminated the inappropriate behavior learned of the behavior but failed to bring it to an end. . . .

Appendix at 15a.

The reasoning of the district court, of the line of cases on which it relied, and of the Court of Appeals that affirmed the judgment clearly is in conflict with that of the

Court of Appeals for the Seventh Circuit in *Young*.[2]

2. THE COURT'S RECENT SEXUAL HARASSMENT DECISIONS DEALT WITH EMPLOYER LIABILITY FOR SUPERVISORY HARASSMENT, FOCUSING ON PRINCIPLES OF AGENCY, WHILE THE COURT EXPRESSLY DID NOT REACH THE QUESTION RAISED HERE, I.E., WHAT NOTICE WOULD BE SUFFICIENT TO IMPOSE RESPONDEAT SUPERIOR LIABILITY.

There were two questions presented in *Faragher* — one about agency, which the Court did answer, and the other about notice, which the Court did not. The *Faragher* court found that "the reversal necessary on the theory of supervisory harassment renders any remand for consideration of imputed knowledge entirely unjustifiable (as would be any consideration of negligence as an alternative to a theory of vicarious liability here)." Bench Op., at 32. Thus, it did not reach one of the questions on which the Court had granted certiorari: "May a fact-finder infer notice to an employer of hostile-environment sexual harassment... through actual notice to an intermediate supervisor, who reports it no further."

While that question was important in *Faragher*,

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[2] *Young* is the principle case upon which Petitioner relies as establishing conflict. *Bonenberger v. Plymouth Township*, 132 F.3d 20, 27 & n. 7 (3rd Cir. 1997) is cited to for the purpose of illumining how low-level a supervisor can be, in that case sergeants, with their knowledge still being deemed knowledge of the employer. *Torres v. Pisano*, 116 F.3d 625, 637 (2nd Cir. 1997) further suggests an approach that differs from the Eleventh Circuit's "higher management" doctrine.

and while both sides briefed it extensively, the issue could not be determined there without further factfinding on remand — unnecessary factfinding in light of the Court's imposition of liability on the basis of agency principles. The question remains both important (and growing more so as the Court of Appeals for the Eleventh Circuit persist in its "higher management" doctrine for notice)[3] and unanswered by this Court. For in cases involving co-worker discrimination, the crucial issue is whether notice is followed by effective reaction or by inaction. The trigger point is notice. The issue in this case is whether notice to Jimmy Sutton was notice to V & M.

If the issue was important enough to be among those upon which certiorari was granted in *Faragher* — in that case, whether the women lifeguard's complaints to Robert (Flash) Gordon, a lifeguard captain who did nothing with the information, constituted notice to the City of Boca Raton — surely it remains important enough to grant certiorari in the case at bar.

3. THE COURT COULD GRANT CERTIORARI, VACATE AND REMAND TO THE COURT OF APPEALS FOR RECONSIDERATION IN THE LIGHT OF ITS DECISION IN *FARAGHER*.

The Court, in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 131 L.Ed.2d 820 (1995), synthesized its prior decision in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 125 L.Ed.2d 74 (1993) as holding that

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[3] *See* discussion *supra* of *Allen* and *Reynolds*, both of which came later than the en-banc *Faragher* decision and followed one of those portions of *Faragher* upon which the Court granted certiorari, as well as of *Splunge*, *Kilgore*, *Cross*, and *Huddleston*.

> [w]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat the same (new) legal rule as "retroactive," applying it, for example, to all pending cases, whether or not those cases involve predecision events.

Reynoldsville Casket Co., 131 L.Ed.2d at 826. A new rule announced by the Court "must be given full retroactive effect in all cases still open on direct review...." *Harper*, 125 L.Ed.2d at 86.

In *Faragher*, the Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Bench Opinion, at 29-30.[4] In the case at bar, one of Graff's antagonists was David Sargent, her foreman,[5] who not only watched while his brother, Ray,

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[4] Petitioner sought and obtained an enlargement of time until June 17 for the filing of the petition, based on the pendency of *Faragher*. When she finally filed it, she suggested a vacation and remand of the case at bar in the event that the Court answered affirmatively the question that Faragher presented about notice to an intermediate supervisor — the question that the Court did not reach. Petition at 10, n. 6. Respondent addressed *Faragher* in its brief in opposition.

[5] Petitioner, while having alleged in her complaint that David Sargent was an "agent" of respondent, did not press that point in her brief nor in her petition. Although petitioner is aware that the Court generally does not deal with matters raised for the first time in a petition for certiorari, the Court's issuance of its opinion in *Faragher* represents a sea change in employment discrimination law, making available relief to petitioner that was not available under prior precedent in the Eleventh Circuit. As the late

(continued...)

engaged in crude sexual behavior towards Graff, but who himself did such things as endanger Graff by ordering her to tie a column of iron during a thunderstorm.

Graff's case is still, in the words of *Harper*, "open on direct review...." A decision is "final," and thus impervious to a change in the law, when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1986) (holding "that a new rule of for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final..." 479 U.S. at 328). "*Griffith* cannot be confined to the criminal law. Its equality principal, that similarly situated litigants should be treated the same, carries comparable force in the civil context." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Granting certiorari, vacating the decision of the Court of Appeals and remanding for reconsideration to apply the new rule of law announced in

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[5](...continued)
Mr. Justice Brandeis observed in *Watts, Watts & Company, Limited v. Unione Austriaca Di Navigazione & Co.*, 248 U.S. 9 (1918) (reversing dismissal of admiralty claim against an Austro-Hungarian company because of the outbreak of World War I, but abating it till the end of hostilities):

> This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require.... And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below.

248 U.S. at 21 (citations omitted).

Faragher to the case at bar.

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